

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:

ARTHUR ALVIN BUFF, III
(Chapter 7 Case 89-40664)

Debtor

ARTHUR ALVIN BUFF, III

Plaintiff

v.

DONNA HARVEY BUFF

Defendant

Adversary Proceeding

Number 89-4061

FILED

at 10 O'clock & 49 min. A M

Date 11/7/89

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

MEMORANDUM AND ORDER

The above-styled adversary proceeding came on for trial on August 18, 1989, to determine the dischargeability of a debt arising out of a divorce decree. After consideration of the

evidence and applicable authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) On April 24, 1989, after a bench trial, the Superior Court of Chatham County, Georgia, entered a final order granting the parties a divorce, awarding custody of the minor child of the marriage to the wife, setting the terms and limitations on visitation as well as setting of child support and dealing with other financial obligations.

2) Specifically, the husband was ordered to pay the wife the sum of \$300.00 per month as child support, the wife was awarded fee simple title to the condominium which had served as the marital residence, the household goods located in the condominium were divided, one automobile was awarded to the husband and the other to the wife and the husband was responsible for payment "of all outstanding marital debts, including but not limited to" Jordan Marsh, Gulf Oil, Western Auto, First Union Mastercard, Citibank Mastercard, J. C. Penney, Sears, First Atlanta Visa, Citibank Visa, and Belk.

3) Wife, however, was ordered to pay the Sears, Belk and Chase Manhattan Visa accounts, which were her sole and separate obligations. Debtor husband seeks a determination that the obligation placed on him by the Superior Court decree to pay the outstanding marital debts are not in the nature of support for the ex-wife and child and are therefore dischargeable in his Chapter 7 case. Wife takes the contrary position. The decree is silent as to whether the obligation imposed by the Superior Court was actually in the nature of support or whether it was part and parcel of a division of property.

4) The husband admitted that while some of the accounts he was ordered to pay were jointly listed accounts, he had executed his wife's signature on the applications when those accounts were opened. He testified that he was authorized by his ex-wife to execute her signature on those loan applications. On the other hand, the wife denies that she so authorized him or had any knowledge of the existence of those accounts. Indeed she testified that it was her discovery of the existence of those debts incurred by the husband without her knowledge that contributed to the breakup of the marriage. After consideration of the testimony I find the wife's testimony to be more credible and thus I conclude that she

did not authorize him to sign her name on any of the contested accounts. The only accounts which the wife acknowledged or indeed which she made charges on were those which she assumed to pay as part of the decree. However, the Superior Court apparently did not consider the question of who had authorized or applied for any of the credit cards in assigning responsibility for repayment of them.

CONCLUSIONS OF LAW

11 U. S. C. Section 523(a)(5)¹ creates an exception from

¹ 11 U.S.C. Section 523(a)(5) provides that:

(a) A discharge . . . does not discharge an individual debtor from any debt--

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

discharge of any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . ", but only if the debt is "actually in the nature of alimony, maintenance, or support". There is ample controlling authority in the Eleventh Circuit and the Southern District of Georgia in interpreting and applying 11 U.S.C. Section 523(a)(5).² The Eleventh Circuit has made it clear that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law". Harrell, 754 F.2d at 905 (quoting H. R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U. S. Code Cong. & Admin. News 5787, 6319). To be held non-dischargeable, the debt must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904. A determination is made by examining the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906.³; Accord

² In re Harrell, 754 F.2d 902 (11th Cir. 1985); Matter of Crist, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) cert. denied, 454 U.S. 819 (1981); In re Holt, 40 B.R. 1009 (S. D. Ga. 1984) (Bowen, J.); In re Bedingfield, 42 B.R. 641 (S. D. Ga. 1983) (Edenfield, J.).

³ In rejecting the analysis in In re Warner, 5 B.R. 434 (Bankr. D. Utah, 1980), Harrell overrules Bedingfield only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding". Bedingfield 42 B.R. at 646. The fact that the circumstances of the parties may have changed from the time the obligation was created

Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986); In re Comer, 27 B.R. 1018, 1020-21 (9th Cir. BAP 1983), aff'd on other grounds, 723 F.2d 737 (9th Cir. 1984). Contra, Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46; Accord Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Calhoun, 715 F.2d at 1109 Pauley v. Spong, 661 F.2d 6, 9 (2nd Cir. 1981). The Harrell court stated:

The language used by Congress in §523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support". The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change. 754 F.2d at 906 (emphasis original).

is not relevant to the inquiry which the bankruptcy court must undertake in a §523(a)(5) action. Harrell, 754 F.2d at 907. In all other respects, Bedingfield remains controlling authority in this jurisdiction.

In analyzing this portion of the Harrell opinion, it is clear that only "a simple inquiry as to whether the obligation can legitimately be characterized as support" is needed. While the court did find that bankruptcy laws, not state law is controlling, it did not explicitly fashion guidelines or otherwise set forth factors to be used in resolving the required "simple inquiry".⁴ The controlling law in this Circuit decided under Section 17(a)(7) of the Bankruptcy Act⁵ suggests that the threshold inquiry "requires a determination of the intention of the parties, as reflected by the substance of the agreement, viewed in the crucible of surrounding circumstances as illuminated by applicable state law". Crist, 632 F.2d at 1229; Accord Holt, 40 B.R. at 1012; Bedingfield, 42 B.R.

⁴ Although the court did not set forth a laundry list of factors which the bankruptcy court should consider, it did state that a "precise inquiry into financial circumstances to determine precise levels of need or support" is not required. Furthermore, the court rejected the reasoning of those courts which conclude that an ongoing assessment of need is required. 754 F.2d at 906. These limitations on the §523(a)(5) inquiry reflect the court's concern for considerations of comity. 754 F.2d at 907.

⁵ Section 17(a)(7) of the Bankruptcy Act provides in relevant part:

A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . are for alimony due or to become due, or for maintenance or support of wife or child . . .

at 646. In determining the "intention of the parties", reference to state law does not violate the clear mandate that bankruptcy law, not state law, controls. See Holt 40 B.R. at 1011 ("There is no federal bankruptcy law of alimony and support. Such obligations and the rights of the parties must be devined [sic] by reference to the reasoning of the well-established law of the states."); See also Bedingfield, 42 B.R. at 645-46 ["While it is clear that Congress intended that federal law not state law should control the determination of when a debt is in the nature of alimony or support, it does not necessarily follow that state law must be ignored completely The point is that bankruptcy courts are not bound by state law where it defines an item as alimony, maintenance or support, as they are not bound to accept the characterization of an award as support or maintenance which is contained in the decree itself." (Citations omitted.)]; Accord Spong, 661 F.2d at 9. In addition to the state law factors used in determining alimony, the federal courts have employed a number of factors to determine whether the debt is actually in the nature of alimony, maintenance, or support. These factors include:

- 1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more

in the nature of support, than property division. Shaver, 736 F.2d at 1316.

2) "[T]he presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. [citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977).]

3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

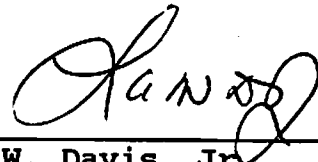
4) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into account all the provisions of the decree. See In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

The non-debtor spouse has the burden of proving that the debt is within the exception to discharge. Calhoun, 715 F.2d at 1111.

As applied to the facts in this case I conclude that the obligation in question can "legitimately be characterized as support" and that, as such, they are not dischargeable. While wife's evidence lacked proof of the relative income and financial resources of the parties, there is evidence to suggest a conclusion that the Superior Court decree was intended as support for wife. First, the debts were incurred solely by husband under circumstances which suggest that wife was not legally obligated to pay them. Second, wife was awarded custody of the minor child and title to the parties' condominium. Finally, the \$300.00 per month in child support was at the low end of the range for support for a father with the income of husband. All these facts suggest that the Superior Court intended the obligation to pay the specified debts as a form of lump sum alimony that was "actually in the nature" of support for wife and the minor child.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the debts of Arthur Alvin Buff, III, to Jordan Marsh, Gulf Oil, Western Auto, First Union Mastercard, Citibank Mastercard, J. C. Penney, Sears, First Atlanta Visa, Citibank Visa, and Belk, are non-dischargeable in these proceedings.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 31st day of October, 1989.